IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 17TH AUGUST 2007 / 26TH SRAVANA 1929

AS.No. 204 of 1993(C)

OS.212/1989 of SUBORDINATE JUDGE'S COURT, PALAKKAD

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APPELLANTS/DEFENDANTS 2 AND 3:

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1. SREEDEVI, WIFE OF SURENDRANATHAN, RESIDING AT VELLAPPANAKALAM, PERUMKULANGARA, PERUVEMB, PALGHAT.

2. DAYOBA, DAUGHTER OF SURENDRANATHAN, RESIDING AT -DO- -DO-

BY ADV. SRI.T.C.MOHANDAS
SRI.T.M.SUNIL
SMT.S.CHITHRA

RESPONDENTS/PLAINTIFF AND DEFENDANTS 1 & 3:

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1. APPUKUTTAN, SON OF THEYYUNNI, RESIDIDNG AT VELLAPANAKALAM, PERUMKULANGARA, PERUVEMB AMSOM, PALGHAT.

(*)2. DAKSHAYANI, WIFE OF THEYYUNNI, -DO-(DIED. LRS RECORDED)

3. KRISHNAKUMARY, WIFE OF PUSHPARAJAN, RESIDING AT MANNIRATTIL, KOZHALMANNAM AMSOM, ALATHUR TALUK.

(*)IT IS RECORDED THAT THE 2ND APPELLANT AND THIRD RESPONDENT ARE THE LEGAL HEIRS OF THE DECEASED 2ND RESPONDENT AS PER ORDER DATED 13.7.2007)

R1 BY ADV. SRI.V.CHITAMBARESH

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 17/08/2007, ALONG WITH CROSS APPEAL THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR ,J

A.S.No.204 of 1993

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Cross Appeal

Dated, this the 17th day of August, 2007

JUDGMENT

Defendants 2 and 3 in O.S.No.212/1989 on the file of the Subordinate Judge's Court, Palakkad are the appellants. Appeal is filed against the decree and judgment passed by the court below by which it was found that the plaintiff in the suit was entitled to get 5/12 shares in the suit property. Plaintiff filed the suit for partition alleging that the entire suit properties were ancestral properties. It was alleged that the suit properties belonged to the family of plaintiff and defendants and there was a partition in the year 1932 and as per that partition deed the properties were allotted to Theyyunni. The first defendant was his widow. The plaintiff, deceased Surendranath and fourth defendant were born to them in the wedlock. It was averred that the properties were in joint possession of the members of the family. It was also averred that plaintiff and defendants are followers of Hindu Mithakshara Law. Theyyunni died in the year 1987. According to the plaintiff after the death of Theyyunni he was entitled to get 5/12 shares, first defendant was entitled to get 1/12 share, defendants 2 and 3 together 5/12 shares and fourth defendant was entitled to get 1/12 share. It was averred that Theyyunni executed a sale deed in favour of the sister of the first defendant for Rs.8,000/-. But the parties never intended to give effect to that document and

Devaki never got the possession and she was never enjoyed the property and she was residing somewhere else and died 12 years prior to the date of filing of the suit. It was averred that defendants were creating documents so as to defeat the claim of the plaintiff. Hence the suit for partition.

2. First defendant filed written statement contending that the plaintiff did not get any right over the suit properties. It was averred that joint family properties were orally partitioned and the plaintiff had included only some of the properties which were allotted to him under the oral partition but included properties allotted to other sharers with ulterior motive and mala fide intention. It was contended that after the oral partition no joint family properties were available for partition. It was contended that some properties were acquired and the plaintiff had appropriated amounts awarded under the Land Acquisition Act. It was also contended that the plaintiff had cut and removed valuable trees stood in the properties and sold the same. It was also contended that all the movables kept in the house of the first defendant were forcibly taken away by the plaintiff. It was also contended that the husband of the second defendant who was the father of third defendant filed a suit for allotment of share given to him under oral partition. That suit was subsequently compromised. It was contended that item No.21 was obtained by the first defendant under a court sale in O.S.No.28/1948 and that was not a joint family property available for partition. It was also contended that the properties allotted to the first defendant under oral partition cannot be re-

partitioned. So the first defendant prayed for dismissal of the suit.

3. First defendant filed additional written statement contending that plaint schedule item Nos.3, 6, 21, 24, 25 and 28 absolutely belonged to first defendant and she was in absolute possession and enjoyment of those items. It was contended that plaint schedule item Nos.10, 19 and 20 absolutely belonged to defendants 1 and 2 and item No.22 was allotted to the share of plaintiff and he is in possession of the same. First defendant claimed certain reservations and equities also. It was contended that Theyyunni's one fourth right devolved upon the first defendant, plaintiff and defendants 2 and 3. It was contended that item No.27 is a place of worship and the same is not partiable. It was contended that item No.28 absolutely belonged to first defendant and not available for partition.

4. Defendants 2 and 3 filed written statement contending that the properties were obtained by Theyyunni under partition deed No.1209/1932 and he was in possession and enjoyment of the same. It was contended that those properties absolutely belonged to Theyyunni and he incurred heavy debts and for settling those debts some of the items in the plaint schedule properties were sold to Devaki, sister of first defendant and in the year 1938 first defendant took those properties on lease for an annual rental of 330 paras of paddy and she was in absolute possession and enjoyment of the property as a lessee. It was also contended that those properties were sold to the husband of the second defendant who was the father of third defendant under sale deed No.652/1982 and he was in

possession and after his death the properties devolved upon defendants 2 and 3 alone. It was contended that item Nos.1 to 4, 7, 9, 11 ti 14, 18 to 20, 22 to 25 and 27 were included in the sale deed and the plaintiff had no right over the same. It was also contended that the properties other than those mentioned in paragraphs 6 and 7 were in the joint possession of the parties and the parties were entered into an oral partition and the they were in separate possession and enjoyment of the same. It was contended that in case court finds that any item of the plaint schedule property was liable to be partitioned, 5/12 shares shall be allotted to the defendants 2 and 3. Though in paragraph 8 it was stated that the details of the right of defendants 2 and 3 are stated in paragraphs 6 and 7, paragraph 7 in the original written statement reads as follows:

Obviously the pleading in paragraph 8 was incomplete. Unfortunately no one had noticed this aspect. A copy of the written statement is made available for my perusal by both sides. The copies given to me by the parties contains more details. It was stated that the deceased Theyyunni had executed sale deed No.652/1980 in favour of Surendranathan; and the vendee became the absolute owner. It was

further stated that after the death of Surendranathan the properties devolved upon defendants 2 and 3.

5. Though defendants 2 and 3 raised a very specific contention that some of the properties were sold by entire members of the joint family together to Devaki and from Devaki the first defendant took the property on lease and she assigned the lease hold right to Surendranathan, the husband of second defendant and father of third defendant, no issue as to whether defendants 2 and 3 had obtained any lease hold right over the property was seen framed for consideration. Even though it was contended that some of the properties were sold by Theyunni in the year 1980, no issue as to whether those properties were available for partition was seen raised.

6. Ext.A1 is the registered sale deed executed by Theyyunni in favour of Devaki to which his sons, first defendant and fourth defendant were signatories. Trial court found that the vendee under Ext.A1 did not get possession. The court below heavily relied on the fact that the plaintiff produced the original sale deed from his custody. First defendant gave evidence to the effect that when she took the entire properties on oral lease Devaki entrusted the original sale deed with her. She further deposed that the same was kept by her and that was stolen by the plaintiff. The court below did not consider the fact that the first defendant was the mother of the plaintiff. The endorsement in Ext.A1 shows that document after registration was returned to one Lakshmanan. It is very pertinent to note that in

the plaint the plaintiff had no case that he was having the original sale deed in his possession.

7. Learned counsel appearing for the appellants/defendants 2 and 3 relied on a decision reported in **Tacoordeen Tewarry v. Nawab Syed Ali Hossein Khan (Indian Appeals Vol.I, Page 192)** and argued that the mere production of a document may not be sufficient in all cases. The court below failed to take into account the close relationship of parties. The mere production of the original sale deed alone is not sufficient to hold that the sale deed had not taken effect.

8. Court below did not consider whether Ext.A1 had taken effect or not. It did not consider the explanation offered by the first defendant that she was having possession of those properties as a lessee and subsequently she assigned those properties to the predecessor-in-interest of defendants 2 and 3. Defendants 2 and 3 had raised a very specific contention that Dakshayani was having a lease hold right over the property and that was assigned to Surendranathan under Ext.B1. No issue regarding oral lease was raised by the court below and referred to Land Tribunal for its decision. It also did not consider the evidenciary value and relevancy of Ext.B6 series tax receipts produced by first defendant. She had produced certain tax receipts to show that from 27.7.1963 onwards she was

paying the land tax. If, as a matter of fact, properties were joint family properties and was in the possession of Theyyunni, how the first defendant paid land tax that too while Theyyunni was alive was not considered by the court below. Trial court also took a view that properties covered under Ext.B2 also ancestral properties. A reading of the recital of Ext.B2 shows that 2nd item included in that was obtained by Theyyunni in the year 1973, that too in execution of decree passed in O.S.No.125/1973. If he obtained the property under execution of decree passed in O.S.No.125/1973, how could that property be treated as ancestral property was also not considered by the court below. Even assuming that first item in Ext.B2 sale deed was an ancestral property. Theyyunni can transfer his right over item No.2 in Ext.B1. A reading of the judgment shows that the court below has not considered any of the issues arising for consideration. Even necessary issues were not raised. So I have no option but to set aside the judgment and decree passed by the court below and remand the case for fresh disposal after raising necessary issues and considering the same in accordance with law.

In the result, Appeal Suit is allowed. Judgment and decree passed in O.S.No.212/1989 are hereby set aside and the matter is remanded for fresh disposal after raising necessary issues and considering the same in accordance with law. Parties shall appear before the court below on 28.9.2007. Being an old suit the trial court shall make every endeavour to dispose of the suit as expeditiously

as possible, at any rate, within a period of six months from the date of receipt of a copy of this judgment.

Plaintiff has filed a cross appeal. That cross appeal is also allowed.

C.M.P.No.1007/1993 will stand dismissed.

K. PADMANABHAN NAIR
JUDGE

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K.PADMANABHAN NAIR, J.

A.S.No.204 of 1993

JUDGMENT

17th August, 2007